

Nov 04, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

TONY RAFAEL BAEZA-CRUZ,
DAVID FILIBERTO DOMINGUEZ-
KU, DIVEIN FERNANDO TOBON-
MUNOZ, JOSE ARMANDO SULUB-
CHAN, and JUAN CARLOS MIS-
BALAM,

Defendants.

No. 2:19-CR-0075-JTR

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

THIS MATTER came before the Court on October 24 and October 28, 2019, for a joint bench trial of all five defendants on Count 1 of the Indictment, which alleged a violation of 8 U.S.C. § 1325(a)(1).

Defendants were not present and excused from attendance pursuant to FED. R. CRIM. P. 43. Each defendant was represented by counsel; Assistant Federal Defenders John Stephen Roberts, Jr., and J. Houston Goddard for defendant Tony Rafael Baeza-Cruz, Attorney Virginia Rockwood for defendant David Filiberto Dominguez-Ku, Attorney Richard Lynn Mount for defendant Divein Fernando Tobon-Munoz, Attorney Terrance Michael Ryan for defendant Jose Armando Sulub-Chan, and Peter Steven Schweda for defendant Juan Carlos Mis-Balam.

The United States was represented by Assistant United States Attorney Matthew F. Duggan through the first full day of trial. The United States was represented by Assistant United States Attorney Russell Smoot on the second and final day of trial.

1 The Indictment is adequate to charge and does charge the completed crime
2 of a knowing entry into the United States at a time and place not approved by
3 immigration authorities and, alternatively, the crime of attempting to enter the
4 United States with the specific intent to be free of official restraint.

5 On September 20, 2019, Count 2 of the indictment was dismissed on
6 Defendants' motion. Count 3 of the indictment was severed and is scheduled for a
7 jury trial before this Court on November 21, 2019.

8 Broadly, in Count 1 the United States alleges that during the late-night hours
9 of April 4, 2019, the five defendants were initially observed on the Canadian side
10 of the United States/Canadian border as they crossed a fence at the border and
11 walked some 300 yards South into the United States. Defendants were contacted
12 by uniformed agents of the United States Border Patrol, briefly queried, then taken
13 to a nearby Border Patrol station for additional processing. The Indictment in
14 question was returned on April 16, 2019.

15 Prior to trial, the parties argued, and the Court ruled on certain pretrial
16 motions, notably Defendant's motion to suppress statements and to exclude certain
17 documentary evidence. The Court granted the suppression motion, in part,
18 permitting the admission in the United States' case-in-chief of the statements made
19 by Defendants in the course of a "*Terry* stop" when initially contacted in the field
20 by Border Patrol agents, but suppressing as violative of *Miranda* statements
21 subsequently made during processing at the Border Patrol station. The Court also
22 excluded photocopies of certain documents allegedly issued by foreign
23 governments and seized from the person of Defendants.

24 At trial, the United States offered the testimony of United States Border
25 Patrol Agents Ross Roley, Michael Egerton, Jorge Vasquez, Jeffery L. Prock, and
26 Seth Justesen. Defendants presented the testimony of Federal Defender interpreter
27 and investigator Maira Perez. The Court also admitted the United States' exhibit
28 purporting to be defendant Tobon-Munoz' written waiver of his *Miranda* rights

1 and three defense exhibits purporting to be photographs of the area where
2 Defendants crossed the border as it appeared in daylight at the time of trial.

3 Whereupon the Court makes the following:

4 **FINDINGS OF FACT**

5 1. On April 5, 2019, sometime between 11:00 p.m. and 11:30 p.m., all
6 five defendants, with a sixth person who is not on trial here, stepped over a three-
7 strand barbed wire fence that ran generally contiguous with the United
8 States/Canadian border. Defendants were on foot and proceeded directly south.

9 2. The fence was in imperfect repair, in some places being fewer than
10 three strands and in some places completely absent. At the place where
11 Defendants crossed, the fence was approximately “waist high.” There were no
12 signs or markers prohibiting entry or identifying an international border. The fence
13 ran through orchards and fields and crossed a two-lane road that ran directly north
14 from the United States and continued into Canada.

15 3. Border Patrol Agent Justenson testified that the place Defendant’s
16 entered the United States was not a point of entry designated by immigration
17 officers.

18 4. Defendants were noticed by United States authorities before they
19 crossed the fence and were continuously monitored from that point until they were
20 apprehended approximately 20 minutes later.

21 5. Border patrol officers deployed to intercept Defendants. A marked
22 vehicle with one uniformed agent moved to a position north of Defendants to
23 prevent their return to the fence. A second marked vehicle containing two
24 uniformed agents took a position in the anticipated path of the southbound walkers.

25 6. Agent Egerton was one of the agents in the vehicle that contacted
26 Defendants as they approached. He testified all individuals were free to walk away
27 at any time. Agent Egerton testified he contacted four individuals who were
28 initially face down in the grass. They said they were from Mexico and did not

1 have documents permitting them to be in the United States. They were arrested
2 and placed in the agents' vehicle.

3 7. Agent Egerton was unsure of the names of the four he dealt with and
4 could not describe their physical appearance. His report did not note that the four
5 individuals he spoke with had initially been lying in the grass.

6 8. Agent Egerton testified that conversations with Defendants were in
7 Spanish and he had studied Spanish in high school and college and when he was
8 trained as an agent, but that in matters of the Spanish language it was his practice
9 to sometimes consult with another agent, named Prock. In turn, Agent Prock
10 described his own grasp of Spanish as "adequate" but acknowledged that at times
11 he needed to consult in turn with Agent McIssac because McIssac was "fluent" in
12 Spanish. Agent McIssac was not present during these events.

13 9. Agent Egerton further testified that when he addressed the four
14 individuals in the grass, he asked them where they were from and they responded
15 "Mexico." The responses from individual Defendants generally were unclear. The
16 actual words of the individuals accosted by Agent Egerton (as opposed to the
17 agent's conclusion as to the statement's meaning) were not recalled by Agent
18 Egerton or available to this Court to evaluate. The specific person(s) making the
19 statement(s) was not identified. Agent Egerton further testified he learned the
20 individuals' nationality later, by asking other agents during processing at the
21 Border Patrol station.

22 10. Agent Vasquez testified he was the other agent in the vehicle with
23 Agent Egerton and he questioned two individuals. He said one named Tobon-
24 Munoz was a resident of Canada and did not have documents permitting him to be
25 in the United States. Agent Vasquez specifically recalled Tobon-Munoz because
26 he was taller than the rest, did not carry a backpack, and wore different clothes.
27 Agent Vasquez testified that his report did not mention anyone lying down in the
28 grass.

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2 11. Agent Prock testified that at the Border Patrol station he read *Miranda*
3 rights to each Defendant. Agent Prock testified Defendant Tobon-Munoz waived
4 his right to silence and answered questions, and Defendant Tobon-Munoz stated he
5 was from Venezuela. The other defendants did not sign waivers of their right to
6 silence.

7 12. Border Patrol Agent Justesen testified he queried two databases, “the
8 Central Indexing System” and “Computer Linked Application Information
9 Management System,” and that neither system had a record of these defendants
10 being legally in the United States or having made application to be legally in the
11 United States. On cross-examination, Agent Justesen acknowledged these data
12 bases were not maintained by the Border Patrol, but rather were maintained by
13 Immigration and Customs Enforcement, for non-criminal purposes.

14 13. The Court takes judicial notice of a decision by the Central District of
15 California, which exhaustively discussed the data bases used by ICE. *See*
16 *Gonzales v. Immigration and Customs Enforcement*, 2019 WL 4734579 (C.D. Cal.
17 Sept. 27, 2019) (holding the various data bases used by ICE are not sufficiently
18 reliable, alone, to support probable cause to issue an ICE detainer).

19 14. The other circumstances surrounding Defendants’ arrests include the
20 lack of any signs warning or identifying the border or prohibiting crossing, and the
21 fact that the fence was not unlike others crisscrossing the area. There is no
22 evidence Defendants attempted to flee and inconsistent, if not minimal, evidence of
23 Defendants’ attempt to conceal themselves.

24 Upon the foregoing Findings of Fact, the Court makes the following:

25 CONCLUSIONS OF LAW

26 1. On April 5, 2019, all five Defendants crossed the border from Canada
27 to the United States at a time and place not designated by immigration officers.

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1 2. From the time prior to crossing the border into the United States,
2 continuously through the time they were taken into custody by United States
3 Border Patrol Officers, all Defendants were monitored by law enforcement and at
4 no point “entered” the United States free from “official restraint” as those terms are
5 contemplated by 8 U.S.C. § 1325(a)(1). *See United States v. Argueta-Rosales*, 819
6 F.3d 1149, 1158-1159 (9th Cir. 2016) (the term “entry” is a term of art requiring
7 both physical presence in the United States and freedom from official restraint).

8 3. The Court finds all five Defendants **NOT GUILTY** of the crimes of
9 “entering” the United States at a time and place not designated by immigration
10 authorities as alleged in Count 1 of the Indictment.

11 4. The evidence surrounding Defendants’ statements in the field is
12 imprecise. The only other evidence of the alienage of Defendants BAEZA-CRUZ,
13 DOMINGUEZ-KU, SULUB-CHAN, and MIS-BALAM is based upon the lack of
14 information in data bases of questionable reliability and does not persuade the
15 Court beyond a reasonable doubt of “alienage.” Accordingly, the Court finds
16 Defendants BAEZA-CRUZ, DOMINGUEZ-KU, SULUB-CHAN, and MIS-
17 BALAM **NOT GUILTY** of being aliens attempting to enter the United States at a
18 point not designated by immigration officials, as alleged in Count 1 of the
19 Indictment.

20 5. Defendant TOBON-MUNOZ was clearly identified as the individual
21 in the field who acknowledged to Agent Vasquez that he was not a U.S. citizen and
22 did not have evidence or permission to be in the United States. After
23 acknowledging his *Miranda* rights, Defendant TOBON-MUNOZ again indicated
24 he was not a U.S. citizen and did not have authorization to be in the United States.
25 Accordingly, the Court finds Defendant TOBON-MUNOZ **GUILTY** of the crime
26 of attempting to enter the United States with the specific intent to be free of official
27 restraint, in violation of 8 U.S.C. § 1325(a)(1), as alleged in Count 1 of the
28 Indictment.

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IT IS SO ORDERED. The District Court Executive shall enter this order and furnish copies to counsel.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE